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United States

Circuit Court of Appeals

For the Ninth Circuit

GOLD HUNTER MINING & SMELTING COMPANY,
Plaintiff in Error.

v.

EDWARD JOHNSON,
Defendant in Error.

} At Law

Brief of Defendant in Error

Upon Writ of Error from the United States District Court for the District of Idaho.

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ANALYSIS OF BRIEF.

CASES CITED.

STATUTES CITED.

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STATEMENT OF FACTS.

This suit comes from the Northern Division of the District of Idaho.

The defendant in error, Johnson, sustained injuries while employed in the mines of plaintiff in error in Shoshone County, Idaho. Johnson recovered judgment and the mining company brings error. The case was tried upon an amended complaint.

The complaint charged in effect that on the 17th day of October, 1914, Johnson was in the employ of the mining company, as a machine man working on the 400 foot level on the night shift. Upon going to work in the afternoon he proceeded to the place where he had received instructions from the defendant to work. In op-

erating the machine drill which had been furnished by the defendant, plaintiff found that the drill was out of repair and it thereupon became his duty under instructions theretofore received, to disconnect the drill, carry it to the level, along the level to the shaft, thence to the main station in the mine and exchange it for another drill. (Par. IV. 20).

That the plaintiff was working in the westerly end of a stope on what was known as the 4th floor above the 400 level. Working near him was a mucker by the name of Holmi. The floors were numbered upward from the level, and in order to reach the shaft it was necessary to go down from one floor to the other to the level. That manways had been previously provided for reaching the floors above the level and ladders were installed for the use of the employes in going from floor to floor.

That in the stope where Johnson was working there were two manways, one of which extended from the 400 level in the westerly end of the stope upward to the third floor, and the other extended near the easterly end upward to the fourth floor.

That from the place where plaintiff was working it was impossible to reach the west manway on the several floors for the reasons: that the west manway did not extend to the 4th floor; that upon the 3rd floor it was not possible to pass from the east manway to the west manway because the floor between the two manways had been taken up leaving an opening into an ore chute which ex-

tended across the entire floor and between two sets of timbers, and moreover a slide chute reaching from the 4th floor to said opening effectively filled the width of the stope. That therefore, the only way to reach the level was downward in the easterly end of the stope and east of the chutes. That the stope on the several floors extended easterly from the manway and the face of the solid ground on the east was somewhat beyond the timbering on each of the floors.

The plaintiff, after taking down his machine, took it too the manway and down from the fourth floor to the third floor by the ladder. The ladder from the second to the third floor had been broken by a fall of rock a short time before the accident to the plaintiff, and at the time of the accident had not been repaired or replaced by the defendant and there was no means of going by the said manway from the third floor to the second floor and the only way by which Johnson could proceed to the second floor was by way of a plank or lagging eight inches in width which had been laid by the defendant from the floor at the easterly end over to the solid face of the stope and inclined downward from the floor toward the face. No guards, rope or other handhold whatever were provided.

Beneath the lagging or plank, the second floor had not been timbered out to the solid ground and there was an opening from the lagging or plank downward to the first floor or to the solid ground which constituted the face of the stope on the first floor.

The complaint then charged that the plaintiff having no other way provided by the defendant proceeded along the third floor to said lagging or plank and while walking on the same, and because of the negligence and carelessness of the defendant in providing such unsafe, inadequate way, paintiff either slipped from the lagging or the lagging turned slightly throwing plaintiff off and downward approximately twenty feet to the first floor with his heavy steel drill falling on top of him and across his back, resulting in his serious injury. (Par. V. 20-23).

The complaint charged that the shift boss of the mining company in charge of the stope and of the plaintiff was Steve Shaw. That it was the duty of the plaintiff to perform such work at such place and in such manner as the shift boss directed. That the shift boss had under his charge other employes of the defendant, including timbermen, miners and muckers. One of the duties of the shift boss was to cause such repairs to be made as were necessary to keep and maintain the place where the employes were required to work in a reasonably safe condition and to make such reasonabe inspections as were necessary.

That on the shift before that upon which the plaintiff was injured, plaintiff called the attention of the shift boss Shaw to the fact that the ladder in the east manway from the second floor to the third floor had been broken and that it was necessary to repair the same, and that the shift boss stated to the plaintiff that he would cause the

same to be repaired and replaced, and that it would be repaired and replaced and directed Johnson to use the way along which he was proceeding at the time of his injury until the said ladder was replaced and the manway repaired. That the plaintiff, relying upon the promise of the shift boss to repair the manway and to replace the ladder, continued in the employ of the defendant up to the time of his injury.

It was further charged that it was no part of the duty of the plaintiff to repair any such ladder or to replace the same and that the repair of the same would not have been within the scope of the plaintiff's employment or duties. (Par. VI; 23-24).

The complaint further charged that the defendant was negligent in providing such unsafe way; that it had full and express knowledge of the condition of said manway and of the way over which the plaintiff was required to go at the time of his injury, and that it had not provided him with a reasonably safe place in which to work, and to go to and from his work, and negligently permitted the said manway to become so out of repair as to be impassable. (Pars. VII, IX. 24-25).

Plaintiff was thirty-three years of age at the time of his injury, earning $3.50 per day, and suffered severe and permanent injuries.

The answer admitted that plaintiff was injured at the place and in the manner alleged, and admitted the permanency and severity of his injuries as alleged. Ad-

mitted that Shaw, the shift boss, had the authority alleged in Paragraph VI of the complaint. It also admitted that it was no part of Johnson's duty to repair any ladder or to replace the same, and that such an act would be without the scope of his employment.

Affirmatively the mining company set up the defenses of contributory negligence, assumption of risk and negligence of a fellow servant.

THE PLAINTIFF'S CASE.

The plaintiff's case rested upon his testimony and that of the other employe, who was working on the fourth floor at the time of the accident, John Holmi.

Holmi testified concerning the accident substantially as follows:

Johnson on the night of the injury was working on the fourth floor, while Holmi was shoveling and mucking ore down the slide chute from the fourth to the third floor where it would fall into the open ore chute (50). The slide chute was extended from the post on one side of the floor to the post on the other side, and the top of the ore chute, which was on the third floor, was open (51). The ore chute he testified was open across the entire stope.

The manway in the west end of the stope extended up to the third floor; that in the manway in the east end the ladder between the second and third floors was broken the night of the accident (53).

Holmi testified that he worked in that stope four nights, the night of the accident being the fourth, and

that on the first night he worked there the ladder had been broken, but not so as to prevent him going up it. The next night it was more broken, but he came up over the ladder the first two nights; on the night that Johnson was injured it was all broken and it was impossible to use the ladder; it was broken all to pieces, a small piece of it was under the muck pile; there was a muck pile around it (54).

He testified that on the night of the accident he went to his place of work by going up to the second floor along the manway in the east end of the stope and over to the face and then by the lagging from the face to the third floor, thence by a ladder from the third to the fourth floor (55). He testified that in going from his place of work on the fourth floor down to the level that that was the best way; that to attempt to go to the other manway in the west end was very dangerous as a man might kill himself going over the chute (56).

He said that the chute extended from post to post, and that between the posts and the wall it was full of muck (57).

Johnson's machine was not working and he stated that he would take it down and exchange it. Johnson left with the machine and the next Holmi knew he heard him call and found him on the first floor lying down.

The place over which Johnson passed, extending from the third floor to the face of the stope, was not guarded in any way. He testified further that the first night he went to work on the fourth floor he went up the

manway in the east end and up the ladder, which was partially broken.

On cross examination, Holmi testified that the first two nights he went to work, he went up the east manway. That on the third night and the fourth night, he went by the plank extending from the face to the third floor. He said that either Johnson or the carman had told him of the plank. The manway in the east end he had seen the first night he went to work there; that you could go up those ladders to the third floor, but it was impossible to reach the east manway so as to climb up to the fourth floor because of the chutes. On one side between the posts and the wall there was no space and on the other side there was a little down near the bottom about eight inches wide. Holmi testified that the first night he went by that way he had to stoop and go sideways, but could get by.

After Johnson's injury his place was taken by a man by the name of George Ashland. That it was not possible for Ashland to have gone from the fourth floor to the third floor and then past the slide chute and timber slide to the manway in the west end and down that way. That after he quit work that night he and Ashland went down the same way they had come up, namely, by the plank in the east end.

The lagging referred to was three inches thick, eight inches wide, a six foot lagging, the upper end was set on a cap and the lower end on a ledge of rock against the end of the stope. There was two and a half to three feet

difference in elevation between the ends of the lagging, and there were no lights there except the miners' candles (63-71).

Holmi also testified that there was a timber slide, but that it did not extend to the fourth floor; it was also west of the chute. That the slide chute was the same width at the bottom as it was at the top, that is, that it was the same width on the floor of the third floor that it was at the roof thereof (105).

He testified that he had helped build the slide chute.

Johnson testified that he had worked at the Hunter off and on for several years; was working with Holmi on the night of his injury. He was working on the fourth floor of the 400 level and his immediate superior was Steve Shaw, the shift boss who looked after the men. That he went to work on the afternoon of his injury, barred down all the loose ground and started to drill when his machine began to leak in a joint, and not having any tools with which to repair it he took it down for the purpose of exchanging it. Such was his duty and the practice in the mine. He had also received orders to do so from the shift boss and foreman who had instructed him that every time a machine broke to take it down and get another one (74-76).

On the day he was injured, he went to his work by the ladders through the east end of the stope; went from the drift to the first floor and then up to the second floor on the ladders. That the ladder from the second to the third floor was broken; rocks had come down the manway

and had broken the ladder. From the second floor he went over to the face and walked upon the plank upward to the third floor and from the third floor to the fourth floor by ladder (77). On page 78, Johnson testified that the ladder had been partly broken the third night before he got hurt; that the muck had fallen around it, but held it up, but that the end was broken; and he could get up the ladder that night, but the night before he got hurt when he came on shift, the hole was blocked up; the ladder was broken and he had to go to the face and up the plank.

His shift boss, Steve Shaw, had been in the stope where Johnson was working the night before he was injured. Shaw had come up the same way because a slide chute was across the stope on the third floor. That Johnson could not get by that slide chute, it extended from post to post. That there was a little hole between the posts and the ground, but that had been all filled up with muck the night before he got hurt and he could not get by that way; he could see no chance to get by (79).

He testified that Shaw came up and said that a man could not get up there and asked Johnson how he got up. Johnson said it was pretty hard to get up there; that he had to go like a rabbit on the timbers, and that Shaw had better get a ladder. Shaw said that he would have the timbermen put in a ladder. That was the night before Johnson got hurt. Shaw also told him to go by way of the plank until the timbermen came up and put in the ladder, and that he would have the timbermen up there

as quickly as he could. That it was a part of the duty of the timbermen to put in the ladder and it was no part of Johnson's duty; he had nothing to do with that (80). Johnson testified that there were timbermen working on the night shift; he said that Shaw also stated that he had given orders for a ladder to be made and sent in. Shaw had charge of the timbermen (81).

Johnson also testified that running from the third floor down to the 400 foot level was a large ore chute from post to post down which the ore ran. On the top of that on the third floor there used to be a floor, but when they made the slide chute they had to open up the floor and then the rock broke in the rest of the floor and the whole floor was up there, and there was only about eight inches of floor left on the side and that was filled up with muck; that would be along the wall. The muck would go over the slide chute, there being only about an eight inch board on the side. He testified that the slide chute extended from post to post and the ore chute was open all the way across the drift, except a narrow plank on one side; on the other side it was broken to the wall; that was the hanging wall side. On the foot wall side, as the vein dipped some, there was a little space between the wall and the post at the floor, but on the hanging wall side it was all broken. He testified there was rock lying all around the ore chute. (82-83).

Concerning his injury Johnson testified that after he took his drill down he took it on his shoulder and went down the ladder from the fourth floor to the third floor;

he then walked along the third floor to the end, stepped onto the plank and then he did not know how it happened, but either the plank turned a little or his foot slipped; everything happened so quickly he could not tell which way it went there; he fell and for a time was unconscious (84-85). He called Holmi and was helped out of the mine.

On cross examination Johnson said he worked on the several floors in the stope in question; he said he was familiar with the manway in the west end of the stope, and that at the time of his injury it was provided with ladders to the third floor. At the time of his injury, the ladder which had been broken was in a manway. He testified that he had frequently gone up the west manway while he was working in the stope. That there was also a timber slide west of the ore chute behind the slide chute; that it only reached to the third floor and did not go up to the fourth floor; it was provided with a sort of hand-hoist (92).

He testified that he would take his drill up into the stope every time on his shoulder; he thought it weighed about 75 pounds.

There was a man known as a "nipper" there; he had already gone by at the time Johnson disconnected his machine. He only came around once or twice a shift. If he had been there just at the time Johnson needed some help, he would have helped to take the machine down, but to wait for him, he might have had to wait all night (95).

The night before he was injured was the first night

that he had ever walked over the plank to his work. He had been going up the ladder from the third floor before that; so long as he had the ladder, he went that way. He said he did not know whether the plank had been in that place before the ladder was broken; when the ladder was broken, he found the plank (95). He said the way he found out the plank was there, there was no chance to go the other way; he looked around, found the plank and went that way. It was in place from the ground to the cap at the time he first saw it. He did not know whether the upper end was nailed or not. He had gone over the plank a few times before he was injured. He had to go up and down it to get his steel. He said sometimes they have a ladder on the station and sometimes not. The ladder which had been broken was all broken up and they had to put in a new ladder; if they had the ladder at the hoist, it would not take very long to put it in. They did not have any ladder made at that time—at least, he could not see any ladder in the whole stope or at the station (98).

He testified that the slide chute had been built a few nights before his injury. The slide chute was of the same width at the top as at the bottom; it was not narrower at the bottom than it was at the top. He said he saw it on the third night before he got hurt and afterward; that he had looked over there to see if there was any chance to get through, but there was no chance to get through when the slide chute was there. He said he saw it the night before he was hurt and the third night before.

The foregoing constitutes in substance the plaintiff's case. It may fairly be stated that from that evidence it appeared:

(1) That on the evening of the 16th of October plaintiff, in going to his usual place of work found the ladder in the east manway between the second and third floors to have been broken down so that it was necessary to go another way to his work;

(2) He went to the east end of the second floor and found a plank extending from the ledge of rock onto the third floor, and he went up that plank to the third floor and thence by the manway to his place of work;

(3) That on that evening he complained to his superior, Steve Shaw, shift boss, and asked him to have a ladder put in the manway between the second and third floors; that Shaw promised him to have it done as soon as he could, and directed him to use the plank as a way until the ladder was put in. That Shaw had himself reached the point where Johnson was working by way of the plank;

(4) That there was no other way of getting to the fourth floor because the third floor was open at the ore chute, the planks either having been removed to permit the rock to be dumped down, or having been broken by the rock shoveled from the fourth floor; and for the further reason that a slide chute extended clear across the third floor, and it was impossible to reach the manway extending downward from the third floor in the westerly end of the drift.

(5) That the way provided, namely, by the plank, was an insecure, inadequate and unsafe way.

(6) That the mining company was negligent in maintaining such a way, and because of the promise and assurance of the shift boss that it would be remedied and the request that Johnson continue temporarily to use that way, the defense of assumed risk would not apply.

DEFENDANT'S CASE:

In this condition of the record the plaintiff in error presented its case, which was substantially as follows:

Certain maps were presented by a surveyor partially made up from actual survey and partially made from information furnished by the shift boss, Shaw.

Shaw testified that he was shift boss under whom Johnson was working on the night of his injury. That he had seen Johnson between a half hour and an hour before he was injured. At that time he was getting ready to drill on the fourth floor of the 400 stope. John Holmi was shoveling near him. On hearing of Johnson's injury, Shaw sent a man by the name of Ashland to take his place and went there himself and found the machine and John Holmi back at work. The machine was down on the second floor at the east end of the stope. He examined the place where Johnson was injured and found the plank from the cap over to the ground right at the east end extending from the third floor down to the end of the stope, not quite to the second (120).

He then testified that he had never seen the plank before that; had never been over it. That there was a

space extending from the end of the floor to the rock as it was their practice not to timber up until there was room to put in a full set, and the space east from the end of the floor was not sufficient for a full set (121).

He testified that he walked over the plank that night at the time he examined it in coming down after the accident. He went by the west manway up to the third floor, crossed over the third floor east to the plank and then down the plank to where the machine was. He walked by the ore chute. That the opening in the floor there was only about two or two and a half feet in width; between the ore chute and the wall in the bottom there was two feet and a half of space, at the top there was not so much—probably eighteen inches. There was no difficulty in getting through there. The slide chute goes in at the top of the ore chute on the third floor extending from the fourth floor and the men shoveled into the slide chute instead of throwing it down into the ore chute; it runs into the ore chute from the slide chute; the top of the slide chute was three feet or three feet and a half wide; at the bottom about two feet and a half (123), the bottom being about a foot narrower than the top. He then went down over the plank to the second floor (124). He testified the slide chute was made about two shifts before the accident.

He testified that the usual way of going from the level to the place where the plaintiff was working that night was up the west manway; they would go up on the

first floor from the second, thence to the third by ladders, then go east along the third floor past the timber slide. That was the course that the miners took in going to the place where Johnson and Holmi were working that night —up the west manway (125-27). Upon reaching the third floor they would go east to the manway to the ladder and then go up on the fourth floor to where he was working. He testifies that around the ore chute it was clean both before and after the accident. There was a ladder from the fourth to the third floor in the east manway; they were working east (128-129).

He denied having had the conversations with Johnson testified to by Johnson (130). On page 130, however, Shaw testified as follows:

> Q. "State whether or not you were aware that he or any other workman under you were traveling up and down over this plank?
> A. Why, they travel—I didn't know anything of this plank until after the accident.
> Q. Then, at the time of the accident, or at the time you went on duty that night, were you aware of their going up and down that way?
> A. I knowed they had went that way."

On cross examination, Shaw testified that he did not know that there was a broken ladder between the second and the third floors; he said there was no ladder there. On page 133, he testified that at the time of the accident there was a ladder lying against the bench at the east end from the second to the third floors, and he testified he supposed that they put it there to come up on the third floor. He admitted that he had charge of the stopes,

ladders and manways; that the ladder was not put there by his order, but it was there and had probably been there a day or two before the accident.

He further testified that he did not go over that way very often. Then immediately testified that he went over to the face of the east breast two or three times every night and had been doing so right along (134).

At page 135, he testified that the ore chute or rock chute extended across the vein from wall to wall and was six feet in length. He also testified that there was two feet on the side of the chute along which a man could pass (137). At page 138 he testified that it was impossible to get behind the post between that and the wall. He further testified that he had not given any instructions to the miners as to which way to get up to the third floor, either to Johnson or Holmi, and did not know which way they went.

He again impeached himself on pages 138 and 139 when he testified that there had been a ladder from the second to the third floor in the east manway; that it had been there before the accident; and then testified that it was there that night, but not in a good condition. He said it was partly covered at the top that night; the manway was partly covered, there was some rock and dirt over the top of the manway, directly contradicting the statement on page 132 that there was no ladder between the second and third floor. His counsel on page 142 attempted to rescue him from this contra-

diction on a very material question in the case, as follows:

> "Q. Now will you point to the place where you stated to counsel the ladder was, that the top of it was covered by muck and rock?
> A. That was this one here, from the first to the second.
> Q. And that is the place that you had in mind when you referred to counsel—in answer to counsel's question?
> A. Yes, sir.
> Q. And is this the one that you said was partially—may have been broken, or—
> A. Yes, was covered on top.
> MR. GRAY: I object, if Your Honor please. He didn't say it was broken.
> THE COURT: No, he said he didn't know whether it was broken or not, Judge Ailshie.
> MR. AILSHIE: I didn't intend to—he said he didn't know, as I remember it."

On cross examination, he was asked if it were not a fact that in that mine it was customary to have at least two manways up into a stope, and he testified not always, and it was not their practice in that stope. In reply to a question by the court, he had to admit that it was the general practice in the mine, and then admitted that the men were accustomed to go through either one manway or the other unless they were instructed to the contrary. He had given no instructions not to use the east manway (145-6).

John Lamberton, the nipper on the shift upon which Johnson was injured, testified that on the night of the accident he went up to where Johnson was working; that he went by the east manway; knew of the existence of the plank and went that way. There was another way

by the west end passing by the chute on the third floor to the manway on the east end and up that manway to the fourth floor. He testified on page 150 that he did not go that way the night the accident occurred; he had passed that way at other times all right. He came down on that night the same way he had gone up—that is, by the east manway. That there was two feet of space on the foot wall side by the chute on which you could walk the night before the accident. On page 151, he said that along the side of the chute on this plank there was nat urally a little dirt that dropped over the slide chute.

On cross examination he admitted that on one night he came up the west manway, came to the chute and called out and after the men called down to him he went back and around the other way. The reason he went around the other way was that he did not want to stop the men from throwing the rock down the chute; after he shouted to stop, there was no rock rolling down there then. He said the reason he did not go through then was that he preferred the other way, he guessed; that they had just opened the chute and it did not look very nice to go through there then (154).

Joe Pellecier testified that he could go between the west manway and walk by the chute. He testified on page 161 that he had gone over to the east end of the stope and by way of the lagging. George Ashland, a miner who replaced Johnson after his injury, testified that he got the machine on the first floor at the east end

and took the machine up that way. He saw there was another ladder there and went up, and after that he did not find more ladders. Went to the second floor on the ladder in the east manway; he then walked over to the bench and climbed up on the bench and up on the plank to the third floor, and then up the ladder to the fourth floor. When he came down he came down the east end (167). He said you could go by the slide chute and ore chute (168), but there was about a foot of muck on the floor beside the ore chute. He testified that there was plenty of room to walk on the side of the chute (170).

On cross examination, he testified that the slide chute was the same width at the bottom as it was at the top; it looked that way to him.

REBUTTAL.

In rebuttal, Johnson testified he had never told Holmi of the plank by which to get to the third floor. He also testified the shift boss, Shaw, was not up where he was working on the night of his injury prior thereto.

Holmi testified that Shaw was not there on the night of the injury, prior thereto.

A motion was made for a directed verdict and denied. The cause was submitted to the jury upon these controverted questions of fact, under instructions which the court will find are not only a correct exposition of the law, but entirely fair to the plaintiff in error, a verdict was rendered, judgment entered to review which judgment this writ of error has been allowed.

In the foregoing statement, the substance of all of

the testimony has been set out. This has been deemed advisable because of the many inaccuracies in the statement of facts in the brief of plaintiff in error. Throughout the brief of plaintiff in error there are statements concerning the facts in the case which are not justified, and which consist either of inferences which counsel draw from the testimony favorable to the plaintiff in error or a one-sided statement of controverted facts. To some of these statements we desire particularly to draw attention.

At the bottom of page 7 and top of page 8 of the brief of plaintiff in error is the statement that "Johnson had also walked on the third floor between the east and west manways and knew that there was sufficient room to pass the ore chute and had used this way in going to the fourth floor"—reference being made to page 97 of the record. The testimony referred to was simply to the effect that at times prior to the accident he had gone up the west manway to the third floor and thence over to the east manway and up the ladder. There is no suggestion, however, that it was after the ore chute had been opened up or the slide chute put in. The facts were that the slide chute had only been built on the night Holmi first worked in that stope, which was three nights before Johnson was hurt (107)

On page 79 Johnson describes the condition at the chutes on the night of his injury. He says:

> "I couldn't get no other ways up, because the slide chute was across the stope on the third floor;

the ladder came up from the west end of the stope, but the slide chute was across the stope, and they couldn't get by that slide chute, because behind the slide chute was filled up with muck, the sides was filled up with muck. There was a little hole between the post—the posts was laying straight here (indicating), but there was a little hole down on the bottom of the posts, between the ground and this post, but that was all filled up with muck the night before I got hurt already, I couldn't get by that way no how. I don't see no chance to get by."

And on page 81, speaking of the ore chute, he said:

"The floor on the top there used to be, but now when they made that slide chute they have to open up the floors, and then the rock broke the floor more, and there was the whole floor up, and there was only about that much place on the sides, you know, and that was filled up with muck like this.

Q. You say, 'like this.' How much?

A. About eight inches.

Q. Eight inches on the side?

A. Yes."

So that the inferences sought to be drawn by the statement in the brief is not a fair one.

On page 8, it was also said that Holmi, the plaintiff's only witness, also knew of the west manway, and had used the same as a means of getting to the fourth floor, and in doing so had passed the ore chute and inclined chute on the third floor. Holmi, on page 66, testified that he never went by the west manway except on the first night he was working there, and it will be remembered that is the night he put in the slide chute and the night when the ore chute was opened. He said on the same page that he could have gone to the third floor by the west manway, but he could not have gone along that floor to the east manway. He said the only way he could

have gone would have been between the posts and the wall. On page 68, Holmi testified that the first night he went through the hole between the wall and the posts. He did not testify that it could be done thereafter, and Johnson testified that that was all filled up with muck.

On page 8 it is also said that the plaintiff knew of the existence of the windlass in the timber slide as a means of hoisting etc. That is true, but this timber slide and windlass that are spoken of were west of the rock chute and inclined chute, so that if the plaintiff's testimony and that of Holmi was to be believed it was impossible for him to reach that timber slide.

It is said at the bottom of page 8 and the top of page 9 that Holmi did not testify that it was impossible to go by way of the ore chute and slide chute, but that he didn't think a man carrying a drill could get by the ore chute and inclined chute on the third floor. Reference is made to page 56. What he actually testified to concerning this matter is as follows:

> "Q. Mr. Holmi, in going from your place of work up here on the fourth floor down to the level on that night, was there any other way that you could go?
>
> A. No, that was the best way, anyhow.
>
> Q. How about this other manway, could you go that way?
>
> A. That was so dangerous he might kill himself going over the chute there."

On page 9 it is said that it was Johnson who told Holmi of the existence of the plank extending from the third floor to the face. Reference is made to page 65 of

the record. What Holmi testified to was that he didn't know whether it was Johnson or Pellichier who told him. On page 173 Johnson testifies that it was not he who told Holmi of the way by the plank.

On page 10 it is said that it is shown that the ladder which had been broken was not as a matter of fact a part of any manway, and it is said that the plaintiff says he did not know whether the broken ladder was a part of the regular manway or not. Reference is made to page 90. We quote his testimony concerning that to show that the inference which is sought to be drawn is not a correct one. He testifies at pages 90-91 as follows:

> "Q. And you were familiar with the manway in the west end of the stope, weren't you?
> A. I don't understand.
> Q. You know there was a manway?
> A. Oh, you, I knew that.
> Q. And at the time of your injuries that manway was complete to the third floor, and provided with ladders, wasn't it?
> A. Yes, to the third floor.
> Q. Now, the ladder which you say was broken was not in a manway was it?
> A. It was there in the manway, but he was broken; the man-hole was there and the ladder was there, but he was broken.
> Q. Isn't it a fact, Mr. Johnson, that the ladder which became broken was one which had been taken from the west manway and brought down to this second floor, and just put from floor to floor, but not in a manway?
> A. I don't know that.

On page 18 of the brief it is said that Johnson told his fellow workman of the existence of this plank. We

have heretofore referred to the fact that such is an incorrect statement of the record.

On page 29 it is said, referring to the plaintiff:

> "He had known of this broken ladder and of the use of this plank for several days and had made no complaint, and had not even notified the master of this condition."

The evidence of both Johnson and Holmi uncontradicted is that the ladder from the third to the fourth floor had been used up to the night before Johnson's injury, and that was the first night Johnson had used it and was the night he spoke to Shaw concerning the placing of a new ladder in the manway, and he thereafter used it because of Shaw's directions to him.

Again at the bottom of page 29 and the top of page 30 it is said: "In the present case the servant had worked several days under identically the same conditions and without complaint." On page 39 it is said:

> "The plaintiff in his testimony (97-98) testified that the ladders were stock ladders of the uniform length of ten feet and were kept on the level of the mine ready to be taken to whatever point they were required, and that sometimes they were even kept in stock on different stations; he testifies that it would only take a few minutes to bring one of the ladders from whatever point they were kept in stock to the place where this ladder was to be put in the east manway."

This is another unfair and incorrect statement of the record. It is best to quote the record for the purpose of seeing what he did testify to:

> "Q. Now, these ladders, Mr. Johnson, that they used there, they are all the same length, aren't they?

A. Yes, about the same length, I guess.

Q. What are they, ten foot ladders?

A. I don't know about that.

Q. And they keep those ladders down on the level ready to take to any portion of the mine and use don't they?

A. Sometimes they have a ladder on the station and sometimes not.

Q. Now, this broken ladder was in such condition that it couldn't be repaired, as I understand you, was it?

A. I don't know. I don't understand what repair means.

Q. This ladder between the second and third floor was all broken, was so broken that it couldn't be repaired, couldn't be fixed.

A. Yes, it was all broken up.

Q. They had to put in a new ladder?

A. Yes.

Q. How long would you say it would take them to get that new ladder and hoist up there and put it in place?

A. Well, if they had the ladder on the hoist it wouldn't take very long.

Q. Just a few minutes, a matter of a few minutes?

A. Yes.

Q. They had the ladders there ready, made, ready to use?

A. No. At that time there wasn't no ladder on the whole place there. I couldn't see no ladder on place.

Q. By the whole place, what do you mean?

A. The whole stope. And not any on the station, either.

Q. How long was this stope?

A. I don't know how long it was.

Q. Between sixty and fifty feet, wasn't it?

A. Oh, I guess it was.

Q. And the cage went up right at the east end of the stope, didn't it? The cage in the shaft was within a few feet of the east end of this stope?

A. Yes, I think it was part of the shaft from the east end of the stope.

Q. And they had ladders on other floors, didn't they, ready to use?

A. I don't know that—not on the floors, but they may be had other ladders, I don't know that because I was working on that level." (97 to 99).

It will also be noticed that on page 81 Johnson testifies that Shaw told him the night before that he had given the foreman orders the day before to send in a ladder, to make a ladder and send it in. So that if any inference is to be drawn it is that there were no ladders whatever ready.

On page 45 it is said that Johnson selected the most dangerous way there was, namely, the plank, whereas, the other manway was available and he might have sent his drill down the timber slide. Of course, that was one of the controverted questions of fact in the case. His testimony and that of Holmi, if to be believed, was that he could not get to the timber slide and that to attempt it was a much more dangerous way than the one he went.

On page 46 it is said:

> "It was the proof of this fact, i. e. that the shift boss, Shaw, even admitting plaintiff's testimony as to his conversation with Shaw to be true, had promised merely to replace a ladder in the east manway, while the plaintiff's injury was due to the use of a plank, *the very existence of which was unknown to the master,* and which was located many feet away from this broken ladder, that caused the trial court to hesitate as to whether or not he would send this case to the jury."

This is an incorrect statement. Shaw did know of the existence of the plank, for Shaw had been using it himself. On page 79 Johnson testifies that Shaw came

up that way the night he was injured. On page 80, Johnson testifies that Shaw told him to go by way of the plank until the timbermen came and put in a ladder. The answer admitted that portion of paragraph VI of the amended complaint which set forth the duties of the shift boss, and which alleged that he had charge of said stope and of the timbermen, and that one of his duties was to cause such repairs to be made as were necessary to keep and maintain the place where the employes of the defendant were required to work in a reasonably safe condition, and to make such inspections as were necessary in the performance of the business of the defendant. So that so far as the facts set forth in the above quotation of the brief of the plaintiff in error are concerned they are inaccurate.

It is then said that it was these things that caused the trial court to hesitate as to whether or not he should send this case to the jury, reference being made to page 178. That is based upon the statement apparently contained on that page, which is as follows:

> "THE COURT: I think that perhaps while the case is without any precise precedent, I shall have to take the view that it is one for the jury. Therefore the motion will be denied."

Certain arguments of counsel and remarks by the court are not in the record and there is nothing to justify the statement that the court hesitated in sending the case to the jury. His statement had reference solely to the argument advanced at the time of the motion, namely, that Johnson was not using the particular way which

the master had promised to repair, but was using the temporary way provided in lieu thereof.

On page 47 it is said:

> "But the plaintiff himself in his testimony (179) did not say positively that either the ore chute or whatever muck may have been near the same would have prevented him from going to the west manway on the night of the accident. Plaintiff merely makes the genral statement that 'there was no chance to get by.'" (79)

That is not an accurate statement of his testimony at page 79 and the court is invited to inspect the testimony.

On page 48 it is said that Holmi testified that by stooping or bending slightly there was no difficulty in using the passage way between the slide chute and the wall (68). That is alsa a mistatement of Holmi's testimony. Holmi testified that on the first night he worked there he could get through that hole. He did not say that he could easily get by or that there was no difficulty in getting by. On page 66 he says that on the night Johnson was hurt he could have gone up the west manway to the third floor, but he could not have walked on the third floor past the slide chute to the ladder.

On page 48 it is further said, "It is shown that he could have used the timber slide which is provided with a windlass." That was a controverted fact for plaintiff and Holmi both testified that he could not get to it.

We have specifically pointed out these inaccuracies and mistatements because we do not desire that they go unchallenged and for the further reason that it most clearly shows a clear conflict in the testimony. If all the

things claimed by the plaintiff in error had been believed by the jury and all of the things testified to by the plaintiff and Holmi had been disbelieved, a different verdict would have been rendered. The verdict, however, shows that these several contentions concerning the facts were found in favor of the plaintiff.

ARGUMENT:

The assignments of error are six in number. The first is directed to the action of the court in denying the motion for a directed verdict.

The second and third are to the action of the court in refusing certain requested instructions.

The fourth, fifth and sixth are directed to certain portions of the charge of the court to the jury.

ASSIGNMENT NO. 1:

The statement of the evidence and the examination thereof will convince the court that the case was clearly one for a jury. The evidence was in sharp conflict upon a number of the material issues. It was not denied that the plaintiff was injured as claimed. It was not denied that his injuries were permanent and severe as claimed. It was not denied that it was the duty of the shift boss, Shaw, to inspect the places where the plaintiff was working and the entries thereto, to cause to be made such repairs as were necessary to keep such places reasonably safe, that it was plaintiff's duty to work at such place and in such manner as Shaw directed that it was no part of plaintiff's duty to repair or replace broken ladders in

the manways, but the duty of Shaw, to cause the timbermen to do so.

Upon all of the other questions there was a sharp conflict, namely:

(1) The plaintiff testified he had complained to the shift boss, Shaw, of the way by which he was required to go to his work, and had requested Shaw to have a ladder put in, and that Shaw promised to have a ladder put in and had instructed the plaintiff to use that way until he would have the timbermen put up a ladder, and that such conversation was on the night preceding the accident. Shaw denied this conversation.

(2) Both Johnson and Holmi testified that the ladder in the east manway between the second and third floor was broken down the night of the accident, and it was impossible to use the manway. Shaw testified that there was no ladder there and that there was not a broken ladder, though he subsequently said that there was a ladder there and that it had been covered up in the upper portion by the muck, and Johnson testified that Shaw had used and had directed him to use it (79-80).

(3) Shaw testified he did not know of the presence of this plank at the east end of the stope extending from the bench up to the third floor. Johnson and Holmi both testified that they had used it for two nights before. The nipper, Lamberton, testified that two nights before he went over the plank and that on some other night previously he had gone that way (154). Shaw testified that he did not know that there was a plank there, although

he testified that he had been over a couple of times each shift to the east face, but he did let it slip out on page 130 that he knew the men were going that way. So that there was a sharp conflict of testimony as to whether or not Shaw knew of the way, had instructed Johnson to use it and knew of the plank.

(4) The defendant contended that there was a safe way by walking along the third floor from the top of the west manway on that floor by the timber slide, the slide chute and ore chute, to the ladder extending from the third floor upward to the fourth floor in the east manway.

The defendant's witnesses testified that they went that way on the night in question after the accident and that there was plenty of room to walk along the foot wall side.

The plaintiff's witnesses, both Holmi and Johnson, testified that the slide chute extended clear across the floor and that in addition to that, the entire floor was open over the ore chute from one wall to within eight inches of the other wall and the eight inches of plank on that wall were covered with rock and muck, and that that opening was approximately six feet long and the width of the floor, except that eight inches.

If their testimony was to be believed, it was obviously a more dangerous way and the court submitted the question to the jury under specific instructions.

(5) It was earnestly urged that the plaintiff assumed the risk but the court held that was a question for

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(5) It was earnestly urged that the plaintiff assumed the risk but the court held that was a question for

the jury, and certainly under the evidence, promise to repair and the instructions to use that way temporarily until the ladder was put in, it became and was a question for the jury.

NEGLIGENCE OF PLAINTIFF:

It is elementary that the duty of the mining company was to use reasonable precautions to keep the entries and passageways which it was necessary for its employes to use in going to and returning from labor reasonably safe.

Buzzell v. Laconia Mfg. Co.
(Me.) 77 Am. Dec. 212.

Lavin v. Jones (Mass.) 95 N. E. 219.

"Where a servant, acting in the line of his duty, walks from one part of the building to another over a walk provided by the master for that purpose, the law regards the walk as a place furnished by defendant for his servant to work in."

Kirby v. Montgomery Bros. & Co.
(N. Y.) 90 N. E. 52.

It was not and is not seriously contended by the defendant that the plank furnished Johnson constituted a safe way.

Upon the question of its negligence the mining company relied upon an attempt to establish that there was a reasonably safe way, namely, by way of the third floor from the west manway to the east manway. The testimony upon this subject was as contradictory and conflicting as could well be imagined. That conflict has heretofore been pointed out and was particularly pointed out by the trial court in his instructions where he said:

"In this connection it is proper that I direct your attention to the fact that there is evidence tending to show that there was another way of reaching the place and coming from the place where the plaintiff was at work. There is a conflict of evidence upon that point, but there is evidence tending to show that there was such a way, and evidence to rebut it. The defendant contends that this other way was a safe one, that is, the way going by the rock chute or slide. If you find that it was a reasonably safe way, and that plaintiff knew of its existence, and, instead, of using it, for his own convenience he carelessly used the more dangerous way, then he could not recover, for, as you will see, his injuries would upon that assumption be the result of his own carelessness in taking a dangerous way, when one reasonably safe was open for his use."

THE DEFENSE OF ASSUMED RISK.

It is most earnestly urged on the part of the mining company that the plaintiff assumed the risk. The doctrine of assumed risk does not apply, because Johnson had complained of this particular defect; a promise to repair had been made, and he had been expressly instructed to use the way by the plank until the repair had been made. It is not questioned that the shift boss, Shaw, had the authority to make the promise to him and the authority to make such repair and the authority to instruct him and in view of the verdict of the jury upon the controverted questions, it must be assumed that Shaw did so instruct Johnson and made the promise to which Johnson testified, and instructed him to go by way of the plank until Shaw could have the manway repaired.

The facts of this case bring it squarely within the rule announced in

Hough v. Texas & Pac. R. Co., 100 U. S. 213.
Southwestern Brewery v. Schmidt, 226 U. S. 162.

In the case of

Hough v. Texas & Pac. R. Co.

the Supreme Court said:

> "If the servant, having knowledge of a defect in machinery, gives notice thereof to the proper officer, and is promised that such defect shall be remedied, his subsequent use of the machinery, in the belief, well grounded, that it will be put in proper condition within a reasonable time, does not, necessarily, or as a matter of law, make him guilty of contributory negligence. It is for the jury to say whether he was in the exercise of due care, in relying upon such promise, and in using the machinery, after knowledge of its defective or insufficient condition. The burden of proof, in such a case, is upon the company to show contributory negligence."

In

Southwestern Brewery v. Schmidt,

the Supreme Court said:

> "Whatever the difficulties may be with the theory of the exception (1 Labatt, Mast. & S. chap. 22, sec. 423), it is the well settled law that for a certain time a master may remain liable for a failure to use reasonable care in furnishing a safe place in which to work, notwithstanding the servant's appreciation of the danger, if he induces the servant to keep on by a promise that the source of trouble shall be removed."

The language cited is directly in point. The declaration there alleged that it was the plaintiff's duty to cook brewers' mash in a cooker; that the cooker was out of repair; that the plaintiff was unwilling to use it, but that the defendant requested him to go on until it could be repaired and promised that it should be within a very short time; that the plaintiff did go on, relying upon the

promise; that the cooker gave away and the plaintiff was badly scalded.

The principle upon which this exception to the doctrine of assumed risk is based is that the master's promise to repair or make safe the place where the servant is working, or the machinery with which he is working, complained of by the servant, creates a new relation under which the master impliedly agrees that the servant will not be held to have assumed the risk for a reasonable time following the promise. In other words, that the risk of the defect is cast upon the master.

Hough v. Texas & Pac. Ry. Co. 100 U. S. 213.
Utah Consol. Mining Co. v. Paxton, 150 Fed. 114.
Crosby v. Cuba Ry. Co., 158 Fed. 144.
Alkire v. Myers Lbr. Co. (Wash.) 106 Pac. 915.
Lamoon v. Smith Cement Brick Co. (Wash.) 132 Pac. 880.
Rothenberger v. Northwestern Consol. Mill. Co. (Minn.) 59 N. W. 531.

In

Cudahy Packing Co. v. Skoumal, 125 Fed. 470.

the Circuit Court of Appeals for the Eighth Circuit says:

> "As before remarked, we are unable to discover any material error in these excerpts from the charge, since the law is well settled that when a defect in a tool or an instrument is called to the master's attention by his servant, and he directs or requests the servant to continue to use it in its defective condition for the time being, promising to have it soon repaired, or to supply a better implement, the servant, by complying with such an order or request, cannot be regarded as having assumed the risk of getting hurt, unless the risk is so great and imminent that a person of ordinary prudence would not have continued to use the defective tool, although he was requested or ordered to do so. It would be little

short of absurd to hold that a servant voluntarily agreed to assume the risk of being injured by the use of a defective implement or appliance, and to absolve the master from liability therefor, when it appears that he complained to the master of the defect, and the master admitted that the complaint was well founded, but induced the servant to continue using the defective tool or appliance by promising to repair it within a reasonably short space of time, or to supply a better. That a servant will not be held to have assumed the risk of injury incident to working with a defective implement of any sort, under circumstances last stated is well settled."

In

Crosby v. Cuba R. Co., 158 Fed. 144

On pages 150 and 151 it is said:

"Ordinarily a servant assumes the risks of danger which are obvious to him because of an implied agreement between him and his master. But if those obvious risks are due to defective machinery, and he complains of the defect to his master, and the master promises to have the defect remedied, and requests him to continue with his work, the implication is that until the promise is executed, or until the time within which it should be executed has expired, the master assumes the risks, unless, indeed, as above stated, the peril is so grave and imminent that the servant cannot continue his work without being guilty of contributory negligence."

In

Utah Consol. Mining Co. v. Paxton,
150 Fed. 114,

The Circuit Court of Appeals for the Eighth Circuit held:

"There is an exception to the rule that a servant assumes the ordinary risks and dangers of his employment, to the effect that, where a servant makes complaint to his master of a dangerous defect in his place of work or in the appliances furnished him, and the master promises to remedy it, the risk of that defect is cast upon the master, and the servant is relieved from it for a reasonable time to enable

the employer to remove it, unless the danger from it is so imminent that a person of ordinary prudence would not continue in the employment after the discovery of the condition."

The state cases are to the same effect. In

Alkire v. Myers Lbr. Co. (Wash.)
106 Pac. 915

it is held:

"An employer's promise to repair defective appliances is in effect an agreement to temporarily assume responsibility for any accident occurring by reason thereof, and the servant does not assume the risk of injury from such defect until the lapse of such time as precludes reasonable expectation that the promse will be performed."

In the still later case of

Lamoon v. Smith Cement Brick Co. (Wash.)
132 Pac. 880

the court on page 883 says:

"We are committed to the rule that in such a case 'the risk of the defect is cast upon the master until such time as would preclude all reasonable expectation that the promise might be kept unless the danger from the defect is so imminent that no person of ordinary prudence would risk injury from it.' "

and in support of its doctrine cites numerous Washington cases and the case of

Hough v. Railway Co. 100 U. S. 213

No construction can be placed upon the case of Hough against the railway company other than that the Supreme Court adopted the principle there that the risk of the defect is cast upon the master for a reasonable time after the complaint is made, for the court quotes from Cooley on Torts the following:

"Moreover, the assurance removed all ground for the argument that the servant by continuing the employment engages to assume the risk."

In

Rothenberger v. Northwestern Con. Mill. Co. (Minn.) 59 N. W. 531.

the Supreme Court of Minnesota holds as follows:.

> "According to the best-considered cases, the real question to be determined is whether, under all the circumstances, as they appear in each case, the master had a right to believe, and did believe, that the servant intended to waive his objection to the defect of which he has complained. This is a question of fact, not of law, and consequently for the jury, at least if not entirely free from doubt. There can be no question that, when a master has expressly promised to repair or remedy a defect, the servant can recover for an injury caused thereby within such a period of time after the promise as would be reasonably allowed for its performance, or within any period which would not preclude all reasonable expectation that the promise might be kept. Hough v. Railway Co., 100 U. S. 213; 1 Shear & R. Neg. sec. 215, and cases cited."

THE COMPLAINT OF THE SERVANT WAS SUFFICIENT AND THE PROMISE TO REPAIR SUFFICIENT TO RELIEVE THE SERVANT:

The mining company seeks to avoid the rule that the complaint of the servant and promise to repair and direction to continue to use the way charged the master with the assumption of risk and relieved the servant upon the usual grounds, namely, that the complaint of the servant was insufficient because it did not in technical language declare that he regarded the condition as dangerous and proposed to quit if the danger was not removed; that the promise of the shift boss was insufficient; that the plaintiff was not induced to remain in the employ by reason of the promise and that a reasonable time after

the promise had been made had expired prior to the injury.

Labatt on Master & Servant, 2d Ed. Sec. 1345 states the principle with reference to the complaint and the promise as follows:

> "When complaining of defective instrumentalities or machinery it is not necessary that the servant shall state in exact words that he apprehends danger to himself by reason of the defects, nor need there be a formal notification that he will leave the service unless the defects be repaired or remedied. It is sufficient if, from the circumstances of the case, it can be fairly inferred that the servant is complaining on his own account, and that he was induced to continue in the service by reason of the promise.
>
> It is ordinarily for the jury to say whether the servant's reliance on a promise by the master induced him to continue work."

In

Highland Boy Gold Min. Co. v. Pouch,
124 Fed. 148

the Circuit Court of Appeals for the Eighth Circuit holds:

> "It is finally assigned as error that the trial judge instructed the jury, in substance, that if the plaintiff called the attention of the shift boss to the fact that some of the posts were taking weight, and the shift boss promised to remedy the defect, and the plaintiff continued to work because of this promise, then he could not be said to have assumed the risk resulting from the particular defect which he had pointed out. It is urged that this instruction ought not to have been given, because there was no evidence that the plaintiff did continue to work because the shift boss promised to remedy certain defects in the timbering that were called to his attention. This contention on the part of the plaintiff in error is not supported by the testimony. There was testimony tending to show that the shift boss not

> only promised to erect additional supports when his attention was called to the fact that certain posts in one part of the stope were taking weight, but that he also assured the plaintiff that it was perfectly safe for him to remain where he was. *It is a fair inference, from the testimony on this point, that these assurances had weight with the plaintiff and induced him to continue at work until the collapse occurred. We think, therefore, that this exception to the charge is without merit.*" (The Italics are ours).

In that particular case the plaintiff called the attention of the shift boss to the fact that the timbers under certain ground were taking weight, and the shift boss assured him that he would have that fixed, and further that it was perfectly safe for him to remain where he was. The only difference in that case and this one is that in this case the shift boss told the plaintiff that he would have the manway fixed and that in the meantime Johnson should use the plank in going to and from his work. The principle is identical.

In

Hermanek v. Chicago & N. W. Ry. Co.
186 Fed. 142

the Circuit Court of Appeals for the Eighth Circuit said:

> "The evidence discloses that the plaintiff, on one or two occasions before the injury in question, complained to Barry, the foreman, of the worn and defective condition of the bars in question, and that they were dangerous to use; Barry stating in response thereto that he would fix them or send them to Clinton to be fixed. Whether the evidence in this regard shows a specific promise upon the part of Barry to procure new or repaired bars, that plaintiff so understood Barry's promise, and relied upon the same, is not altogether clear; but the evidence in this respect is of such a character that it should have

been submitted to the jury to say whether or not Barry's statements to plaintiff were intended by Barry, and understood by plaintiff, to be a promise that new or repaired tools would be furnished and whether plaintiff continued to work with the tools, relying upon such promise. The law is that an employe does not assume the risk by continuing to work a reasonable length of time with worn and defective tools, after having notified the employer, or the foreman, standing in the place of the employer, of the worn and defective condition of the tools, and obtained from the employer, or foreman, standing in his place, a promise that new ones or repaired ones would be obtained and furnished."

In

Thorpe v. Missouri Pac. Ry. Co. (Mo.) 2 S. W. 3

it is said:

"The dependent position of servants generally makes it reasonable to hold any notice on their part sufficient, however timid and hesitating, so long as it plainly conveys to the master the idea that a defect exists, and that they desire its removal; that the real question to be determined in each case is whether, under all the circumstances, the master had a right to believe, and did believe, that the servant intended to waive his objections to the unfitness of his fellow servant, or the defect in the materials provided for the work."

In

Myhra v. Chicago, M. & P. S. Ry. Co. (Wash.) 112 Pac. 939

it was contended that the complaint was not sufficient; the promise not sufficient, and that the employe did not continue to work in reliance thereon. The court held that they were questions of fact rather than of law and consequently for the jury, if not entirely free from doubt.

In that particular case, the defect complained of was

upon a car. The car had been in use for three or four weeks and the respondent, a brakeman, was familiar with its defects. A short time before the accident the servant had in a conversation with the terminal engineer of the railroad suggested to him that boards should be removed from the side doors so that they could be opened and signals given from there, also for the purpose of permitting them to get out, the car which was in use being one where the ends only were open; that the terminal engineer replied that the use of the car was only temporary, "but that 'we will hold out the first box car,' or that 'we (meaning the crew) could hold out the first small box car—if we saw any small box car come to the coast—hold it out and they would fix it up for a caboose.'" And further, "'We will fix it up.'" On cross examination, the witness further said that Osgood, the conductor, and himself were in the car when the conversation took place, and they were talking 'about how the car was there and such like.' The court said with reference to the conversation:

> "The conversation occurred in the car between two men experienced in railroading. They both knew that the car had neither platform or brakes. Osgood knew that the brakeman was the signal man, and that the giving of signals from either end of the car when the car was in motion was dangerous. When the respondent said to him that the removal of the boards and the opening of the door 'would give us a chance to stay there and give signals and also to get out if it was necessary,' he knew that the complaint had reference to the hazard incurred by the brakeman in giving signals. The complaint was made on behalf of himself and the other brakeman.

> It is said that he did not point out the particular peril to be avoided. The jury, however, was warranted in inferring that this was known to Osgood. They were talking about a car the defects of which were well known to them. The jury had a right to infer that the conversation was not altogether without purpose. That which may be reasonably inferred from a fact stated is as legitimate evidence as the statement itself."

It is urged by the plaintiff in error that the conversation related by Johnson wherein the shift boss promised to remedy the defect was opened by the shiftboss. It is further urged that the use of the ladder in the manway was a mere convenience. The argument hardly needs reply. The court must be convinced that the servant, on the first occasion after the manway became impassable, complained to the shift boss concerning the condition. It must be assumed it was for his own benefit and that he might go by the usual way rather than walk a narrow eight inch plank. It is not reasonable to believe that he would have remained in the employ of the defendant had he been required to go to and from his work along such footways. However, those were all questions for the jury and have been determined in favor of Johnson.

It is urged in the brief of plaintiff in error that Johnson was not induced to remain in defendant's employ by the promise to make the place safe, but the jury found that he was.

It is urged that he did not testify expressly that it was such promise that induced him to remain. We respectfully suggest that the self-serving declarations of a

servant that he remained in the employ because of such promise would not add materially to the weight of the testimony. The conclusion is one which the jury draws from all of the facts.

There must have been some purpose in Johnson's complaining to the shift boss. It was not a mere idle conversation, and we submit that the master assumed the risk of Johnson going by the plank according to his orders for a reasonable time after the promise was made.

A REASONABLE TIME AFTER THE PROMISE HAD NOT ELAPSED.

It is urged that the plaintiff continued to work after the expiration of a reasonable time within which to repair. It may be stated as a general proposition that the question of what is a reasonable time under the circumstances is for the jury. In the case of

Acme Harvesting Co. v. Atkinson, 208 Fed. 244,

it is said:

> "The authorities almost uniformly sustain the proposition that a person may rely upon a promise to repair without being guilty of contributory negligence, and that the question of reasonable time is one of fact for the jury. Here the jury have found for the plaintiff on that point, and we find nothing in the evidence to show that such finding was not based on and justified by the facts appearing of record."

In

Odell v. Mfg. Co. v. Tibbetts, 212 Fed. 652,

it was held:

> "That this is one of the class of cases where, in the federal practice, the determination of what is a reasonable time is ordinarily for the jury cannot

> be disputed; and if the defendant had desired more specific instructions, or to bring to the attention of the court or jury the question which it now seeks to bring to our attention, it should have been more specific; and so this general exception to two pages of a charge substantially correct cannot be availed of."

In the case at bar on the first shift after the manway became impassable, he complained to the shift boss about it and said he should get a ladder there. The shift boss promised him that he would do so; stated he had already ordered a ladder and would have the timbermen put it in, and for Johnson to use the way by the plank until it was put in.

The shift boss further told him he would get the timbermen there as quickly as he could and the only inference to be drawn from the record is that there were no ladders in the mine for Shaw told Johnson he would give orders to have a ladder made and sent in. Johnson was injured on the succeeding shift.

As a matter of law, the court certainly could not say that that was an unreasonable time under all of the circumstances.

It is urged that the promise to repair does not relieve the servant of the assumption of risks incidental to instrumentalities of simple construction. Here the servant was not using any tool or instrumentality of simple construction which caused his injury. He was engaged in working a machine drill. His complaint had to do with the entry by which he reached his place of work, and with the safety of his place of work, and it was no part

of his duty to repair or keep such entry safe. In

Highland Boy Gold Min. Co. v. Pouch, 124 Fed. 148

the putting of props in a mine was not a complex matter any more than repairing the entry in this case. The doctrine of promise to repair or make safe applies to the place of work as well as to the instrumentalities with which a servant is working.

In

Narramore v. Cleveland etc., R. Co., 96 Fed. 298,

Judge Taft said:

> "It makes logical that most frequent exception to the application of doctrine by which the employe who notifies his master of a defect in the machinery *or place of work*, and remains in the service on a promise of repair, has a right of action if injury results from the defect while he is waiting for the repair of the defect, and has reasonable ground to expect it."

It will be noticed that the court refers the doctrine of the promise to repair not alone to a particular piece of machinery with which the servant is working, but to the place of work.

Lamoon v. Smith Cement Brick Co., (Wash.) 132 Pac. 880.

This last case had to do with a runway on which the plaintiff was wheeling concrete. The rule was applied to a place of work in

Brown Cracker Co. v. Johnson, 154 S. W. 684.

where it was claimed that the master was negligent in furnishing an illy-lighted place of work. Complaint had been made and promise to provide better lights given.

The same is true of a defective foot-board on an engine.

Berglund v. Ill. Cent. R. Co. (Minn.) 123 N. W. 928.

Moreover, the claim that the principle does not apply to simple tools is disputed by the highest and perhaps by the weight of authority, at least in the Federal Courts. In

Hermanek v. Chicago & N. W. Ry. Co., 186 Fed. 142

the Circuit Court of Appeals for the Eighth Circuit applied the doctrine to a claw-bar, and said:

> "No sound reason exists for a different rule being applied to a simple tool than to a complex one, when the defective and dangerous character has been called to the master's attention by the servant, and a promise made by the master that the defect would be remedied or a new tool furnished."

In

Shea v. Seattle Lbr. Co. (Wash.) 91 Pac. 623

the tool complained of was a wooden stick used to clean a chute in a sawmill, whereas, it was claimed an iron rod should have been provided. In

Dudley v. R. P. Hazzard Co. (Me.) 92 Atl. 517,

the doctrine was applied to a defective jointed pole used to clean a chute in a factory for lowering certain woodenware.

CONTRIBUTORY NEGLIGENCE.

It is finally urged that plaintiff was guilty of contributory negligence. The argument is that there was another way, namely, by the west manway. However, that was one of the controverted questions of fact in the case submitted to the jury under express instructions.

The evidence here is that all of the men working or having occasion to go to the fourth floor of the stope in question on the night of the injury and the night before had gone by way of the plank, and the testimony of both Johnson and Holmi is that the shift boss, Steve Shaw, went that way. The testimony of Johnson is that Steve Shaw directed him to go that way.

It certainly could not be contended, as a matter of law, therefore, that the danger was so great or imminent that a person of ordinary prudence would not use that, the only way. So that we respectfully submit that the court committed no error whatever in submitting the negligence of the mining company and the questoins of contributory negligence and assumption of risk to the jury.

ASSIGNMENT OF ERROR NO. 2.

The requested instruction No. 1, the refusal to give which is assigned as error, was fully covered by the instructions given, and particularly that portion commencing at the bottom of page 185 and extending to the middle of page 186, as follows:

> "In this connection it is proper that I direct your attention to the fact that there is evidence tending to show that there was another way of reaching the place and coming from the place where the plaintiff was at work. There is a conflict of evidence upon that point, but there is evidence tending to show that there was such a way, and evidence to rebut it. The defendant contends that this other way was a safe one, that is, the way going by the rock chute or slide. If you find that it was a reasonably safe way, and that plaintiff knew of its existence, and, instead, of

using it, for his own convenience he carelessly used the more dangerous way, then he could not recover, for, as you will see, his injuries would upon that assumption be the result of his own carelessness in taking a dangerous way, and when one reasonably safe was open for his use."

ASSIGNMENT OF ERROR NO. 3.

The refusal to give instruction No. 2 requested by the defendant and covered by assignment No. 3 was not error for the court fully covered the question of assumed risk in his instructions as the same are found at pages 182, 183, 184, 185 and 186 of the Record.

ASSIGNMENT NO. 4.

This assignment of error should not be dignified by argument. The court referred to the fact that some of the jurors had been upon a previous negligence case where the principles of law were in some respects the same and in some respects different and he therefore advised those who had been upon the previous case that they should lay aside any recollection they had thereof. The exception seems to be that it was prejudicial to the defendant to have the jury reminded of a case which some of them had previously tried. The court did it for the purpose apparently of advising them to lay aside any recollection that they had thereof.

ASSIGNMENT NO. 5.

This assignment is to a portion of the instruction of the court upon the question of assumed risk. The court used a very simple example of a case of assumed risk.

Only a portion of the court's instruction upon the question of assumed risk is set forth in the exception. The exception is based:

Upon the proposition that under the instructions of the court the doctrine of assumed risk would not be applied unless the employer called the attention of an employe to the defective condition of an instrument or instrumentality. It is only necessary in answer to this exception to say that a reading of all of the court's instructions upon the question of assumption of risk will show that the question was fairly, fully and intelligently presented to the jury.

ASSIGNMENT NO. 6.

That assignment is to a portion of the instructions, namely, "that the plaintiff cannot recover unless the defendant was negligent and unless such negligence contributed to or caused the accident." The exception taken at the time the instructions were given are shown at page 188 of the record:

> "MR. WAYNE: One other exception, if Your Honor please, to the instruction of the Court advising the jury that they must first find whether the defendant was negligent, and, if so, whether the negligence of the defendant was the proximate cause of the injury, or contributed to the injury, our exception being to that portion of the instruction to the effect that they might find for the plaintiff if the negligence of the defendant contributed with his own negligence to his injury.
>
> THE COURT: I didn't intend so to instruct. I thought that when I came to contributory negligence that I expressly instructed them that even though the defendant was negligent, and that negli-

gence contributed to the injury, still, if he was negligent, and his negligence contributed to the injury, he could not recover. Did I not so instruct?''

That the court was quite correct is shown by the fact that in his instructions the question of contributory negligence was covered as follows:

''It is a general rule, and I should say to you that it is a rule adopted by the express statute of this state, and hence is binding upon all of us, if we are law abiding citizens, it is a general rule that even though the defendant is negligent, and that negligence contributes to an injury, if, at the same time, the plaintiff himself, the employe, is guilty of negligence also contributing to the injury, then he, the plaintiff, the employe, cannot recover from his employer. That is what is ordinarily referred to as contributory negligence.'' (181) * * * *

''However, if it appears to your satisfaction from the evidence as a whole, then it is unimportant from what source the proof of evidence may have come, and as I have already intimated to you, if you find that the plaintiff himself was guilty of negligence in the premises, and that his negligence contributed to his injury, then he cannot recover.'' (182).

In the record the mining company assigns as error the insufficiency of the evidence to sustain the verdict of the jury and in the brief of paintiff in error the grounds thereof are set forth as the seventh subdivision of Assignment No. 1. The practice of the Federal Courts does not recognize any such ground for reversal.

Section 1011 Revised Statutes.
Martinton v. Fairbanks, 112 U. S. 670.
Hall v. Houghton, etc., Co. 60 Fed. 350.

The evidence, however, was convincingly favorable to the defendant in error.

We respectfully submit that there are no grounds

for the reversal of this case. The plaintiff in error has had a particularly fair trial. The court in his instructions commented upon the fact that the case had been calmly tried and argued in a commendable way. The verdict is not a large one, considering the character of the injuries.

Respectfully submitted,

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